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[illegible]

[illegible]

Supreme Court of the United States

[illegible]

No. 77[illegible]

[illegible]

Petitioners,

[illegible]

Petitioner,

v.

[illegible]

Respondent.

[illegible]

May it Please This Court:

The separate petitions for certiorari have been filed on behalf of certain appellants in this case [illegible] (No. 771, 772, 773) the Honolulu Rock petition filed May 1, 1950 (No. 780). But due to the absolute resemblance of these petitions, involving as they do the same controversy and presenting identical arguments, respondent submits this brief in answer to both petitions.

[illegible]

In their anxiousness to frame a petition which might induce the granting of certiorari, petitioners have gone outside the record and have misstated matters within the record. Despite this distortion, we shall demonstrate that the two contentions made in the petition are totally devoid of merit.

As a complete answer to both points in both petitions, we will show: (1) that the jurisdiction was settled on a prior appeal; (2) that the so-called absent parties are actually before the court by representation; (3) that the so-called absent parties are not indispensable, and that there are no conflicting decisions; (4) that in no event could the complaint be dismissed since the jurisdiction was invoked on the additional ground that a federal question is necessarily involved; (5) that the defense of nonjoinder of parties is not ground to dismiss (as constitute merely a plea in abatement not involving jurisdiction and as such is not subject to review; (6) that having made no motion in the trial court to bring in the so-called absent parties, petitioners cannot now be heard to complain that the Court erred in failing to order such parties brought in; and (7) that the minor interest question was decided by the District Court and by the Court of Appeals not contrary to the local law but in complete accord with it.

II.

The Jurisdictional Question Is Settled By a Prior Appeal

Straining to make a case for certiorari, the petitioner here contrived a different presentation of their jurisdictional attack in an effort to avoid the settlement of this question on the prior appeal.

Both petitions assert as the point of paramount importance that indispensable parties were omitted. But precisely this same contention was decided adversely to petitioner on the first appeal (see P. 28 [illegible] pet. for cert. 27 [illegible]) making it imperative to any hope of reexamination that their jurisdictional objection be reimposed. To this end they now urge in their second set of petitions to this Court for certiorari "distinction between the first appeal and the second" relative to jurisdiction.

The first petition contains the attempt to circumvent the prior ruling (pp. 4, 5): "The District Court dismissed the cause for lack of jurisdiction. The Circuit Court of Appeals reversed this decision and remanded for trial on its merits, holding, under the issues then presented, that the defendants in question were not indispensable, for the reason that a decree could be entered on the issues raised by the plaintiff without affecting the rights of the absent parties. (see P. 28 [illegible].) Petition for writ of certiorari to this Court from the first decision of the Court of Appeals in the instant case was denied (see U. S. [illegible]). The case was finally tried on the entirely different theory that plaintiff had inherited from its predecessor and remainder interest under the will."

A similar effort to bypass the holding of the first appeal is made in the first petition where this statement appears (pp. 6-7):

Although petitioners press *Young* v. *Powell* (5 C.A.), 165 F. 2d. 147, cert. den. May 1, 1950, it is patently inapplicable to the case at bar as the court, itself, made clear.*

In the *Powell* case one residuary distributee of an estate sued to cancel and rescind transactions allegedly consummated by the defendant through the perpetration of fraud and the exertion of undue influence upon the testator. The executor of the estate and other residuary distributees were omitted as parties. The court expressly approved of those cases applicable here, such as *Payne* v. *Hook*, 74 U.S. 425; *Waterman* v. *Canal-Louisiana Bk. Co.*, 215 U.S. 33, and *Seeley* v. *Cornell*, 74 F. 2d. 353, but held they were inapplicable because the plaintiff in the *Powell* case was endeavoring to enforce "an indivisible right" of rescission, whereas in the *Payne, Waterman* and *Seeley* cases because of "the separate and divisible nature of the plaintiff's de-

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* The action of this Court on May 1, 1950, denying certiorari in *Powell* v. *Young* (No. 688) to review the decision in 179 F. 2d. 147 (5 C.A.) would appear to control here. The petition in the *Powell* case is identical with the petitions in the instant case. The *Powell* petition, like those at bar, asserted a failure by the Court of Appeals to follow this Court in its declarations of law as to indispensable parties. Each of the petitions, there and here, makes the further claim that there is a conflict in the decisions from the several Circuits upon the indispensable party question.

Comparison of the petitions at bar and the *Powell petition* will at once reveal the common basis for these unfounded contentions. It flows from a failure to distinguish between cases wherein the right asserted was separate and divisible and those where it was indivisible and unitary, a distinction drawn specifically in the opinion of *Young* v. *Powell*, 179 F. 2d. 147, and in the several cases cited to which reference will be made.

Attempting to show conflict with this Court, the petitioner in *Powell* v. *Young* cited: *Payne* v. *Hook*, 74 U.S. 425; *Horn* v. *Lockhart*, 84 U.S. 570; *Waterman* v. *Canal-Louisiana Bank*, 215 U.S. 33; *Princess Lida* v. *Thompson*, 305 U.S. 456; *Sutton* v. *English*, 246 U.S. 199; and *Borer* v. *Chapman*, 119 U.S. 587. Attempting to show conflict among the Circuits, the petitioner in the *Powell* case cited: *Roos* v. *Texas Co.*, 23 F. 2d. 33; *Seeley* v. *Cornell*, 74 F. 2d. 353; *Atwood* v. *National Bank of Lima*, 115 F. 2d. 861; *Williams* v. *Crabb*, 117 Fed. 193; *Texas Company* v. *Wall*, 107 F. 2d. 45; *DeKorwin* v. *First National Bank of Chicago*, 156 F. 2d. 858.

It should be observed that the ruling upon the prior appeal in the instant case, *Korwin* v. *First Nat. Bank*, 156 F. 2d. 858, cert. den. 329 U.S. 795, was unsuccessfully invoked by the *Powell petition* to show the same conflict as is asserted in the petitions for certiorari here.

mand'' the other interested persons were not indispensable. The court held the *Powell* case to be controlled by *Shields* v. *Barrow,* 58 U.S. 130, and by that portion of the decision in *Hudson* v. *Newell* (5 C.A.), 172 F. 2d. 848, pertaining to the cancellation of instruments, and ruled that the absent parties were, therefore, indispensable.

Shields v. *Barrow,* 58 U.S. 130, the controlling authority in *Young* v. *Powell,* 179 F. 2d. 147, has been distinguished from the decisions applicable here in the following cases, among others: *Horn* v. *Lockhart,* 84 U.S. 570, 579; *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U.S. 33, 48; *Roos* v. *Texas Co.* (2 C.A., by L. Hand, J.), 23 F. 2d. 171, 172, cert. den. 277 U.S. 587; *Currier* v. *Currier* (S.D.N.Y.), 1 F.R.D. 683, 684; *Chidester* v. *City of Newark* (3 C.A.), 162 F. 2d. 598, 600; *Oxley* v. *Sweetland* (4 C.A.), 94 F. 2d. 33, 33, 37; *Edenborn* v. *Wigton* (5 C.A.), 74 F. 2d. 374, 376, cert. den. 294 U.S. 719; *Hudson* v. *Newell* (5 C.A.), 172 F. 2d. 848, 852; *Young* v. *Powell* (5 C.A.), 179 F. 2d. 147, 151; *Kentucky Nat. Gas Corp.* v. *Duggins* (6 C.A.), 165 F. 2d. 1011, 1015.

The petitioners have also introduced *Barney* v. *Baltimore City,* 73 U.S. 280, to show confusion in the law relating to indispensable parties. The *Barney* case held that in a suit to partition land all interested persons are indispensable. The correctness of this proposition has never been doubted since it is obvious that partition can not be had without necessarily and adversely affecting the rights of cotenants. The principle of *Barney* v. *Baltimore City,* therefore, manifestly can have no application to the instant case.

The conclusion is irresistible that no conflict exists now, and that there never has been conflict in the decisions applicable to the case at bar. These cases uniformly hold that an heir, next of kin, legatee, devisee, or cestui has a

severable and divisible interest in property and may assert his individual right to a share of the fund, estate or property and obtain an accounting without making parties to the suit all others interested. And this has been held true whether those interested but absent parties are identified with the plaintiff in interest or are adverse to him.

Whether a person has a several or joint interest in a fund, estate or property is answered by reference to State law, but there can be no reference to State law for the determination of whether in Federal court proceedings a person is a dispensable or indispensable party to litigation. The latter question is for the Federal courts to determine exclusively, and for obvious reasons. The decisions are uniformly to this effect. See *DeKorwin* v. *First Nat. Bank,* 156 F. 2d. 858, 860, cert. den. 329 U.S. 795; *Equitable Trust Co.* v. *Denny* (7 C.A.), 24 F. 2d. 169 at 170; *Chicago M. St. P. R. Co.* v. *Adams County* (9 C.A.), 72 F. 2d. 816 at 818; *Rogers* v. *Penobscot Mining Co.* (8 C.A.), 154 Fed. 606.

"The peculiar and limited jurisdiction of the Federal courts, affected as it is by the citizenship of the parties, has resulted in a well-recognized modification" (*Equitable Trust Co.* v. *Denny,* 24 F. 2d 169, 170, per Lindley, J.) of chancery rules, otherwise applicable, for the determination of indispensable parties. Accordingly, it is the rule in the Federal courts that all the *cestuis* of a trust are not indispensable parties to a suit for the removal or appointment of a trustee. *Sanders* v. *Hall* (10 C.A.), 74 F. 2d. 399, 404, cert. den. 295 U. S. 739; *Wesson* v. *Crain* (8 C.A.). 165 F. 2d 6. *In re National Realty Trust,* 167 F. 2d. 440, cited by petitioners, is not to the contrary for it holds no more than that beneficiaries of a common law trust, in reorganization under the Chandler Act, must be given notice because the Statute requires it.

The Koch petition (pp. 24-25) conjures up certain developments which it is suggested could possibly cause the decree to leave the controversy in a condition "wholly inconsistent with equity and good conscience," as does the *Pratt* petition (p. 19) in referring to the shares in this estate as pieces of a pie. The far fetched situations, invented in an obvious attempt to fit several decisions holding omitted parties to be indispensable, could arise only if the time for division and distribution arrived while the accounting is still being conducted by the District Court. However involved the problems might be in such event, this Court gave the solution in *Payne* v. *Hook,* 74 U.S. 425. After pointing out in the *Payne* case (p. 432) that "it can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked," this Court said (p. 432):

> "A court of equity adopts its decrees to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefits of the litigation."

IV.

A Federal Question Is Also Involved Giving The Court Jurisdiction Independently Of The Diversity In Citizenship.

Jurisdiction of the Federal Court was also invoked in this cause upon a second, independent, ground, it appearing from the complaint (R. 133): "That the jurisdiction of this Court is invoked, as will hereinafter more fully appear, . . . upon the further ground that a Federal question is

necessarily involved." In this connection the plaintiff had averred (R. 147):

> "That by reason of the premises a right has accrued to plaintiff . . . to have construction of the act of Congress involved herein and a ruling upon its application hereto . . .

We need not labor the point, though, that a substantial Federal question is necessarily involved in the cause. The petitioners, without seeming to be aware of its import, have expressly conceded that the suit is one arising under the constitution and laws of the United States.

In the Koch petition, the following admission appears (pp. 3-4):

> "The original and the several amended complaints also challenged, as a matter of construction of the will and the application of State and Federal statutes, the trusteeship of the First National Bank of Chicago (156 F. 2d 858, 859, 860; R. 441; record in this Court in *First National Bank* v. *DeKorwin*, October term, 1946, No. 696, pages 3-21)."

The Pratt petitioners make this concession (pp. 3-4):

> "The complaint also challenged as a matter of construction of the will and the application of State and Federal statutes, the trusteeship of the First National Bank of Chicago. (156 F. 2d 858, 859, 860; R. 441; record in this Court in *First National Bank* v. *DeKorwin*, October Term, 1946, No. 696, pages 3-21.)"

There can be no doubt of the respondent's request for declaratory relief being effective to raise a Federal question under the McFadden Act in its relation to the right of the First National Bank to administer the trust. *E. Edelman & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852, cert. den. 300 U. S. 680; *Crosley Corp.* v. *Hazeltine Corp.*, 133 F. 2d 925, cert. den. 316 U. S. 813; *Dewey & Almy Claim Co.* v. *Am. Anode*, 137 F. 2d 68, cert. den. 320 U. S. 761.

And it is settled that once jurisdiction of the Federal court has been properly invoked it "has jurisdiction to determine and settle all issues." *Greene* v. *Louisville R. R. Co.*, 244 U. S. 499, 508; *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 264; *Davis* v. *Wallace*, 257 U. S. 478, 482; *Chicago G. W. Ry.* v. *Kendall*, 266 U. S. 94, 97-98; *Linquist* v. *Dilkes*, 127 F. 2d 21, 25. See, also, *Hurn* v. *Oursler*, 289 U. S. 238; *R. R. Comm.* v. *Pacific Gas Co.*, 302 U. S. 388, 391, and *Armstrong Co.* v. *Nu-Enamel Co.*, 305 U. S. 315, 325.

It has been repeatedly held that if there be one Federal question in the case it is of no importance that the others are non-Federal since the court having been validly invested with jurisdiction retains it to determine all questions, both local and Federal, which are a part of the controversy. (*Davis* v. *Wallace*, 257 U. S. 478, 482; *R. R. Comm.* v. *Pacific Gas Co.*, 302 U. S. 388, 391.)

It inevitably follows that apart from the diversity jurisdiction all of the issues in this case were properly before the court for consideration and disposition. And since the existence of a Federal question alone brought this about, it follows also that the citizenship of the interested parties is unimportant. Assuming without conceding that petitioners' contention with respect to absent indispensable parties were sound, and upon such parties being brought in total diversity of citizenship disappeared, such a development could not destroy the Federal Court's jurisdiction. In these circumstances the action could not be dismissed because the omitted parties might be brought before the court by supplemental powers. The proceeding is one *in rem* and all persons interested in the estate are within the reach of constructive service. Under such circumstances, if the petitioners would not bring in the absent parties, the respondent would certainly be accorded that opportunity. In any event, it is clear that the cause could not be dismissed for want of jurisdiction in the court.

V.

The Future Interest Question Was Decided In Complete Accord With The Local Law.

As the second and last point in each petition it is claimed that the Court of Appeals and the District Court ruled contrary to Illinois law in finding that the remainders were vested estates (Koch petition, pp. 26-35; Pratt petition, pp. 24-33). In essence these arguments are identical, the gist of their complaint being that the courts below followed the Illinois Supreme Court rulings in *Warrington* v. *Chester* (1920), 294 Ill. 524, and *Smith* v. *Shepard* (1939), 370 Ill. 491, to the effect that the remainders were vested, instead of the earlier determination in *People* v. *Byrd* (1911), 253 Ill. 223, that the limited estates were contingent remainders.

In actuality there can be no serious dispute of the vested character of Otto Young's remainder gifts. We need only turn to the outstanding authority on future interests for the rule of definition which exactly fits Otto Young's dispositive language (Gray on Perpetuities, 4 ed., sec. 108):

> "Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of or into the gift to the remainderman then the remander is contingent; but, if, after the words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus a devise to *A* for life, remainder to his children, but if any child dies in the lifetime of *A* his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to *A* for life, remainder to such of his children as survive him, the remainder is contingent."

The opinion of the District Court was written by Judge Igoe and the opinion of the Court of Appeals by Judge

Lindley, each of these learned jurists being a lawyer of long and wide experience at the Illinois bar. What was said in the recent case of *Spiegel* v. *Commissioner*, 335 U. S. 701, therefore, has peculiar application here. In the *Spiegel* case this Court, speaking through Mr. Justice Black, said (pp. 707-708):

> "It is contended that under Illinois law the corpus of this trust would not have reverted to the settlor had he outlived the beneficiaries. The record reveals that the state law problem here is not an easy one, but under this Court's decision in *Meredith* v. *Winter Haven*, 320 U. S. 228, the difficulty involved did not relieve the Court of Appeals of its duty to make a decision. The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficaries die the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of state law. (*Helvering* v. *Stuart*, 317 U. S. 154, 162-165; cf. *Steele* v. *General Mills*, 329 U. S. 433.)"

A short and ready answer to petitioners' extensive arguments that the adjudications below upon the quality of remainders were erroneous is to be found in the scholarly opinions on this subject by the District Court and the Court of Appeals. In respect of the remainder issue, Judge Igoe said (R. 409, 412-413, 415; 84 F. Supp. 918, 927, 929, 930):

> **"The foundation for this entire controversy is thus squarely presented: Are the gifts in remainder to Otto**

Young's grandchildren vested or contingent interests? Established rules for the construction of wills must guide the court in deciding this basic issue. Differentiating between vested and contingent remainders under the law of future interests seems invariably to have been fraught with difficulty, and as attested by the extensive arguments made here this case is no exception. The course of this litigation has been marked by the cooperative conduct of all counsel in the avoidance of unessential pleadings and needless proof, and able and exhaustive briefs have been submitted thoroughly presenting the several problems involved. . . .

"The cases both here and elsewhere dealing with this problem have, in overwhelming number, affirmed the position taken by the plaintiff. Plaintiff's counsel concedes that from time to time beginning with Bates v. Gillett, 132 Ill. 287, 24 N. E. 611, contrary decisions have been announced by the Supreme Court of Illinois, among them People v. Byrd, 253 Ill. 223, 97 N. E. 293; Cummings v. Hamilton, 220 Ill. 480, 77 N. E. 264, and Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214, upon which and the principle of which some of the defendants rely. The plaintiff asserts that the latter decisions follow Bates v. Gillett, 132 Ill. 287, 24 N. E. 611, in principle, and that the Bates case, overruled in Dustin v. Brown, 297 Ill. 499, 130 N. E. 859, can no longer be deemed applicable. See Crowley v. Engelke, 394 Ill. 264, 272, 68 N. E. 2d 241. This court is of the opinion that at all relevant times the authorities opposed to Bates v. Gillett were numerically in preponderance, and that Dustin v. Brown destroyed the efficacy of the principle upon which the defendants must rely to defeat the plaintiff's claim.

"The special emphasis which People v. Byrd, 253 Ill. 223, 97 N. E. 293, has been accorded by counsel for some of the defendants has necessitated special consideration of it. That was a tax case, and both sides agreed that the will involved there should be controlled by the law of New York. Only New York cases were cited by the Illinois Supreme Court in its opinion. It is disapproved by text writers, whose opinions upon Illinois law have been accorded recognition, as not in harmony with the authorities. It applies a principle approved in Bates v.

Gillett, and rejected in Dustin v. Brown. It cannot be reconciled with the later case of Warrington v. Chester, 294 Ill. 524, 128 N. E. 549. For some one or more of these reasons People v. Byrd, even if it were otherwise applicable here, can not be accepted as an authority....

"The cumulative impact of the great weight of authority which plaintiff's counsel has brought to bear upon this issue of construction, aided by reference to the general rules of construction, and further supported by the special context of Otto Young's will, has persuaded this court to adopt the view that the remainder gifts of corpus to grandchildren were always vested. This remainder was vested in such of the testator's grandchildren as were in esse at his death and opened up to let in others as they were afterward born. If the remainder was thus vested it seems conceded that it would be divested in favor of issue alone. The defendants do not controvert the latter proposition and, indeed, it does not seem that such could successfully be disputed in the face of the array of authorities cited in support, which include, among others, the following: Siddons v. Cockrell, 131 Ill. 653, 23 N. E. 586; Knight v. Pottgieser, 176 Ill. 368, 52 N. E. 934; Pingrey v. Rulon, 246 Ill. 109, 92 N. E. 592; Northern Trust Co. v. Wheaton, 249 Ill. 606, 94 N. E. 980; 34 L. R. A., N. S., 1150; Warrington v. Chester, 294 Ill. 524, 128 N. E. 549; Dustin v. Brown, 297 Ill. 499, 130 N. E. 859; Smith v. Shephard, 370 Ill. 491, 19 N. E. 2d 368; Continental Ill. Nat. Bank v. Kane, 308 Ill. App. 110, 31 N. E. 2d 351."

Sustaining the District Court's adjudication of vested remainders, Judge Lindley, speaking for the Court of Appeals, said (R. 486-487, 488; 179 F. 2d 347, 349-350):

"Although appellants argue that the language 'the surviving issue of any deceased grand-child to stand in the place of and receive the share which such deceased grand-child would have been entitled to receive if then living' definitely evinces an intent upon the part of the testator that the gifts to his grandchildren should be contingent upon their surviving the termination of the trust, an examination and analysis of Illinois cases dealing with the effect of language substan-

tially like that quoted impels the conclusion that the contention must be rejected. It is true that, prior to 1915, a number of Illinois cases held that the existence of a clause providing that the children or descendants of a deceased remainderman should take the parent's share made the remainder contingent. Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214; Cummings v. Hamilton, 220 Ill. 480, 77 N. E. 264; Brownback v. Keister, 220 Ill. 544, 77 N. E. 75; People v. Byrd, 252 Ill. 223, 97 N. E. 293. Of these, Bates v. Gillett has since been overruled, in part at least; Dustin v. Brown, 297 Ill. 499, 508, 130 N. E. 859; Crowley v. Engelke, 394 Ill. 264, 272, 68 N. E. 2d 241, and the extent to which People v. Byrd can be relied upon is somewhat clouded by the fact that the will there involved was construed on the basis of the law of New York rather than that of Illinois, even though the court held the law of the two states to be the same. And that the view expressed in those cases was not then the settled view of the Illinois court seems evident from the decisions in Siddons v. Cockrell, 131 Ill. 653, 23 N. E. 586; Knight v. Pottgieser, 176 Ill. 368, 52 N. E. 934, and Northern Trust Co. v. Wheaton, 249 Ill. 606, 94 N. E. 980, 34 L. R. A., N. S., 1150, all decided prior to 1915, in which remainders were held vested despite the presence of a clause providing that the children or descendants of a deceased remainderman should take the deceased parent's share.

"Since 1915, we think, the Illinois cases have uniformly held that such a provision as that under discussion does not prevent the remainder from vesting on the death of the testator but rather fixes the conditions upon which divestiture will occur and the executory gift over, i.e., the gift to the descendants of the deceased remainderman—take effect. Remmers v. Remmers, 280 Ill. 93, 117 N. E. 474; McBride v. Clemons, 294 Ill. 251, 128 N. E. 383; Warrington v. Chester, 294 Ill. 524, 128 N. E. 549; Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62; Boye v. Boye, 300 Ill. 508, 133 N. E. 382; People v. Allen, 313 Ill. 156, 144 N. E. 800; Smith v. Shepard, 370 Ill. 491, 19 N. E. 2d 368. See also Hodam v. Jordan, D. C., 82 F. Supp. 183.

"Of course the District Court, in construing the Young will, was bound to follow the law of Illinois as last announced by the Supreme Court of that state, Erie Railroad v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487; Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 327. Thus, in determining the effect to be given the clause, 'the surviving issue of any deceased grand-child to stand in the place of and receive the share which such deceased grand-child would have been entitled to receive if then living,' we think the court below properly relied on the rule announced in Warrington v. Chester, 294 Ill. 524, 128 N. E. 549, and Smith v. Shepard, 370 Ill. 491, 19 N. E. 2d 368, rather than that of People v. Byrd, 253 Ill. 223, 97 N. E. 293. The decisions in those cases, considered in conjunction with the settled Illinois rules preferring vested rather than contingent interests, Riddle v. Killian, 366 Ill. 294, 300, 8 N. E. 2d 629, and favoring the early vesting of estates, Murphy v. Westhoff, 386 Ill. 136, 140, 53 N. E. 2d 931, led the District Court to the conclusion that the remainders involved in the present case were vested rather than contingent. The same considerations seem to us to require this court to affirm the judgment in that respect. . . .

"And finally, it must be remembered that the best guide to the testator's intent is the particular dispositive language used by him. Here, that language, though perhaps not as plain as some might desire, is substantially equivalent to that which Illinois construes as creating a vested remainder, subject to divestiture only by death with issue in the period prior to distribution. Knight v. Pottgieser, 176 Ill. 368, 52 N. E. 934; Warrington v. Chester, 294 Ill. 524, 128 N. E. 549; Smith v. Shepard, 370 Ill. 491, 19 N. E. 2d 368. In the case of Stanley Young, the event upon which divestiture was conditioned never occurred, and his interest in the corpus passed, on his death intestate, to his heirs at law, through one of whom (his father) the present plaintiff claims."

In the light of these lower court opinions it is impossible to regard the petitioners' future interest argument as having been seriously submitted.

VI.

Conclusion.

Other reasons might be advanced why the petitioners' assertion that indispensable parties were omitted will not support issuance of the writ of certiorari. For instance, petitioners' complaint amounts to a defense of nonjoinder, and the Rules specifically provide that such omission "is not ground for dismissal of an action" (F. R. C. P., 21).

Again, the Rules provide for assertion of certain defenses by motion (Rule 12b), among them being "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, . . . (7) failure to join an indispensable party." The very listing of these grounds for attack on a complaint indicates that a failure to join indispensable parties constitutes neither a lack of jurisdiction over the subject matter nor a lack of jurisdiction over the person. A motion under Rule 12b (7) would, therefore, amount to a plea of abatement not involving jurisdiction. Section 2105 of the Judicial Code (Title 28, U. S. C., § 2105) provides: "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

It might be assumed purely for the argument, then, that the Chancellor was in error with respect to his ruling upon the failure to join an indispensable party, and yet such error could afford no basis for a reversal in this Court.

Furthermore, petitioners not having moved to have the so-called absent parties joined in the trial court (Rule 21) cannot be heard to complain here that such parties were not brought in.

No foundation for review by certiorari having been shown either in the petition of Gwendolyn Koch or in the petition on behalf of Marie Pratt, *et al.*, the applications for such further appeal should be denied.

Respectfully submitted,

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